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CHAPTER K

SECURE ENVIRONMENT CONTRACTING

I. INTRODUCTION. As a result of this instruction, the student will understand:

- A. The processes involved in awarding and administering secure environment contracts.
- B. The challenges of litigating protests and contract disputes in secure environment contracting.

II. REFERENCES.

- A. Federal Acquisition Regulation.
- B. Defense Federal Acquisition Regulation Supplement.
- C. Applicable supplemental agency acquisition regulations. *E.g.*: AFARS, NAPS, AFFARS.
- D. DoD 5220.22 – M, National Industrial Security Program Operating Manual (January, 1995).
- E. AR 715-30, Secure Environment Contracting (Draft). (Available at: <http://acqnet.sarda.army.mil/hotlist/default.htm>.)
- F. AR 380-28, Department of the Army Special Security Officer and Office System.
- G. AR 380-381, Special Access Programs (12 Oct 1998).

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- H. Agency Specific Procurement Regulations or Instructions (Classified).
- I. DCAA Instruction 5205.11, Procedures for Implementing Audit Effort of Special Access Programs (SAPs).

III. CONTRACT FORMATION.

A. The Requirement.

1. Supply, Service, or Construction.

2. Nature of Program.

a. Special Access Program (SAP).

(1) Program approvals.

(2) Clearance/access restrictions. Need to know. Contractors agree to undergo random polygraph exams. Government personnel polygraphed as required by agency.

(3) Contract marking, transmittal, and storage.

b. Sensitive Compartmented Information (SCI).

(1) Program approvals.

(2) Know and follow agency SCI security regulations.

(3) Contract marking, transmittal, and storage.

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- c. Other secure contracting.
 - (1) Obtain necessary approvals.
 - (2) Contract marking, transmittal, and storage.
- d. Simplified Acquisition.
 - (1) FAR Part 13; DFARS Part 213.3. Purchases not exceeding \$100,000; \$200,000 in a contingency, humanitarian, or peacekeeping operation.
 - (2) Obtain necessary approvals.
 - (3) Document marking, transmittal, and storage.
 - (4) Purchase (Visa®) card program. Used by non-contracting personnel.
 - (5) SF 44, Purchase Order-Invoice-Voucher. Transactions in support of intelligence and other specialized activities addressed by Part 2.7 of Executive Order 12333.
 - (6) Imprest Funds. Imprest funds are available for use in classified transactions. DFARS 213.305-3(ii)(B).

3. Value of Buy.

- a. Major system. Requires formal source selection procedures under DoD 5000 series. Includes presentations before high level agency boards.
- b. Regular buy. Either FAR Part 12 (Commercial); 14 (Sealed Bidding) or 15 (Competitive Negotiations) procedures.
- c. Simplified acquisition. Use FAR Part 13 procedures.

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4. Fiscal Considerations.

- a. Fiscal statutes and regulations apply.
- b. Specific issues in Appropriation and Authorization Acts.
- c. Watch purpose and time of program/project specific funds.
- d. Congressional Reporting requirements.

5. Intellectual Property Considerations.

- a. Early consideration in acquisition planning process. Requiring activity must consider the type of intellectual property rights it wants when preparing statements of work/specifications.
- b. Cutting edge technology.
- c. Patent and data rights.
- d. Cleared intellectual property attorney (Patent Counsel).

B. People and Procedures.

1. Cleared Government Personnel.

- a. Contracting officer.
- b. Contract specialists/negotiators.
- c. Requirements personnel/Contracting Officer's Technical Representative (COTR/COR).

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- d. Program Security Officer.
 - e. Administrative Contracting Personnel.
 - f. Auditors.
 - g. Financial personnel.
 - h. Counsel.
2. Cleared Contractors. Contractors must have appropriate program clearances to receive solicitations.
3. Competition.
- a. Other than full and open competition.
 - (1) National Security, 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR 6.302-6. Disclosure of agencies needs would compromise national security unless agency can limit sources. Competition required to maximum extent practicable.
 - (2) No publication in Commerce Business Daily. FAR 5.202(a)(1).
 - (3) Need Justification and Approval (J&A). FAR 6.303 and 6.304 signed at appropriate level.
 - (4) Does **not** justify sole source automatically!

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- b. Facility clearance for contractors.
 - c. Labor standards. Check with your contracts policy branch to see if waivers are in place for these standards or if agency is exempt by statute. It is difficult to follow the reporting and procedural requirements of the labor standards in secure environment contracting.
 - (1) Service Contract Act, FAR 22.1000 – 22.1026. Applies to service contracts over \$2,500. Need Wage Determination.
 - (2) Davis Bacon Act, FAR 22.400 – 22.407. Construction contracts over \$2,000. Need Wage Determination.
 - d. Outside Contract Administration Personnel.
 - (1) For DoD. Cleared DCMA administrative contracting officers, auditors and counsel. Both DCMA and DCAA have cleared or clearable personnel.
4. Preparing Solicitation Documents.
- a. Normal FAR solicitation formats.
 - b. Special terms and conditions:
 - (1) Security. Contract Security Classification Specification (DD-254). (Appendix A). Program specific security guide.
 - (2) Communication between parties.

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- (3) Invoicing/payments. Handling of invoices and cleared finance personnel.
- (4) Bid protests. Special procedures. (See III B(7) *infra*).
- (5) Contract disputes. Special procedures.

5. Receipt and Evaluation of Bids/Offers.

- a. Transmission of bids/offers. Specify where/how to send bids/offers.
- b. Evaluation by cleared evaluators. FAR evaluation rules apply under FAR Parts 13 (Simplified Acquisition), 14 (Sealed Bidding) and 15 (Competitive Negotiation).
- c. Discussions are conducted in FAR Part 15 buy.
- d. Audit of contractor's cost or pricing data by cleared DCAA auditors.
- e. Facilities clearances. As required, contractors' facilities are inspected and certified for work and storage of classified material.

6. Award.

- a. No-publication. If necessary, coordinate with agency Public Affairs/Information offices.
- b. Congressional notification is often required. Count on Congressional oversight.

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- c. Debriefing/reading off of unsuccessful offerors and destruction of solicitation documents.
- 7. Protests by Unsuccessful Bidders/Offerors.
 - a. Yes you can have them in this environment!
 - b. Special protest procedures with GAO.
 - (1) Cleared GAO attorneys.
 - (2) Cleared outside/inside counsel.
 - (3) Facilities (they may be at your site).
 - (4) Thoroughness – relevancy disappears to achieve fairness.
 - (5) Hearings – Secure facility.
 - (6) Decisions – Oral or written – NO PUBLICATION.
 - c. Protests at Court of Federal Claims.
 - (1) Special procedures and cleared judges.
 - (2) Courtrooms (Like A-12).
 - (3) Need cleared DoJ attorney.
 - (4) Decision and appeal to Court of Appeals for Federal Circuit.

IV. CONTRACT ADMINISTRATION.

A. Who Does It?

1. Outside administrators – Assignment to *e.g.*: Defense Contract Management Agency (DCMA). Administrative Contracting Officers (ACO) provide day-to-day contract management.
2. In-house administration. Usually done by Procuring Contracting Officer.
3. COR/COTR. Technical expertise. Works with contractor

B. Contract Disputes.

1. Armed Services Board of Contract Appeals (ASBCA).
 - a. Special disputes clause requiring filing notice of appeal with contracting officer.
 - b. Coordination with Chairman, ASBCA for cleared judge and special appeal number.
 - c. Logistical arrangements.
 - (1) Courtroom.
 - (2) Cleared court reporter for depositions and hearings.
 - (3) Document filing and storage.
 - (4) Hearings.

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(5) Decision.

(6) Appeals to Court of Appeals for the Federal Circuit (CAFC).

2. Court of Federal Claims (COFC).

a. Special disputes clause requiring filing notice of appeal with contracting officer.

b. Coordination with COFC for cleared judge.

c. Coordination with Court Security Officer.

d. Coordination with Department of Justice (DoJ), Commercial Division for cleared DoJ attorney.

e. Logistical arrangements.

(1) Courtroom.

(2) Court reporter for depositions and hearings.

(3) Document storage.

(4) Hearings.

(5) Decision.

(6) Appeals to CAFC.

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C. Contract Closeout.

1. Dedicated group to handle closeout issues:
 - a. Final invoices and audits.
 - b. Intellectual property.
 - c. Storage of files.
 - d. Classified Contract Novation.

V. ACCOUNTABILITY.

A. Who's Watching?

1. Congress.
 - (a) Committees.
 - (b) GAO.
2. Industry (Same players all the time).
3. Senior Agency Procurement Officials.
4. Inspectors General.
5. Internal Audit Agencies (*e.g.*: Army Audit Agency, Naval Audit Service).
6. Technology Management Office (Army).

VI. CONCLUSION.